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No. 82-1447

In the Supreme Court of the United States

OCTOBER TERM, 1982

NASSER G. AFSHAR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In this federal income tax case, petitioner seeks review of the decision below holding that he is liable for deficiencies in tax and fraud penalties for the years 1958 through 1962.[1]

The pertinent facts may be summarized as follows: During the years in issue, petitioner represented himself to various construction and engineering firms as a person of influence in obtaining contracts with the government of Iran. Petitioner sought and received a total of $363,013.20 in "advances" from these firms, purportedly to cover his expenses in securing the Iranian contracts (Pet. App. 5a). Petitioner repeatedly made promises to bring Iranian negotiating teams to meet with firm representatives and to repay

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[1]The opinion of the court of appeals (Pet. App. 1a-2a) and its order denying a petition for rehearing filed by petitioner (Pet. App. 55a) are unreported. The findings of fact and opinion of the Tax Court (Pet. App. 3a-53a) are officially reported at 41 T.C.M. (CCH) 1489.

the advances he had received. None of the firms, however, obtained a contract or even a single negotiating session through petitioner's efforts (Pet. App. 42a). Moreover, petitioner failed to return virtually all of the funds advanced (*ibid.*). Instead, he used most of the funds for unauthorized personal expenditures (Pet. App. 9a, 11a, 42a) and he ignored repeated requests for repayment of the funds (Pet. App. 11a, 13a). The records of the Internal Revenue Service showed that petitioner filed no returns for the years in question (Pet. App. 47a-48a). On audit, the Commissioner issued a statutory notice of deficiency, including additions for fraud, based on the amounts received from the various corporations.

In this Tax Court proceeding, petitioner claimed that he had filed tax returns for the five years in issue (Pet. App. 46a-47a). He also contended that he incurred deductible business expenses in connection with the contracts he sought in Iran which offset his gross income with the result that he owed no tax for each of the years in issue (Pet. App. 29a). After hearing petitioner's testimony, the Tax Court found that petitioner had swindled the funds received from the ten firms (Pet. App. 3a, 41a-43a), that he did not file tax returns for the years in issue (Pet. App. 47a), and that his alleged offsetting business deductions did not exist (Pet. App. 32a-33a, 38a-39a).[2] As a result, the Tax Court determined that substantial deficiences existed in all years in issue (Pet. App. 3a-53a).

In addition, the Commissioner presented proof of petitioner's fraudulent intent, including the following indicia of fraud: (1) petitioner admitted to one of the firm representatives that "he always wanted everything paid to him outside

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[2]In his notice of deficiency, the Commissioner allowed petitioner more than $43,000 in business expenses (Pet. App. 30a). The Tax Court allowed petitioner additional deductible business expenses of $263.12 and $152.90 for the years 1961 and 1962, respectively (Pet. App. 33a).

the United States, so that he could evade this country's income taxes by concealing the money and not reporting the income" (A. 388);[3] (2) petitioner failed to file tax returns and, therefore, failed to report substantial amounts of income over a long period of time (A. 238-256, 355-362, 1025-1034); (3) petitioner refused to turn over records in his possession and repeatedly postponed meetings with revenue agents during the course of the Internal Revenue Service investigation (A. 271-275, 688-689); and (4) petitioner placed the funds advanced by his clients in a Swiss bank account where they would be concealed from the taxing authorities (A. 384, 392, 487-488, 516, 524-525, 635-637). The Tax Court found that the underpayments were due to fraud (Pet. App. 52a). Consequently, the Tax Court held petitioner liable for the 50% addition to tax under 26 U.S.C. 6553(b). The court of appeals affirmed (Pet. App. 1a-2a).

1. Petitioner argues (Pet. 9, 10-13) that both the Tax Court and the court of appeals adopted a standard requiring that the government prove only an "affirmative indication" to establish civil tax fraud (see *Stoltzfus* v. *United States*, 398 F.2d 1002, 1005 (3d Cir. 1968), cert. denied, 393 U.S. 1020 (1969)), and that this standard conflicts with decisions of other circuits that have employed an "affirmative act" standard. See *Jones* v. *Commissioner*, 259 F.2d 300, 303 (5th Cir. 1958); *First Trust & Savings Bank* v. *United States*, 206 F.2d 97, 99 (8th Cir. 1953). But even assuming *arguendo* that there is in fact a substantive difference between these two standards, it is clear that here the Tax Court employed the stricter affirmative act standard that petitioner would characterize as imposing a heavier burden on the Commissioner. The court stated that "* * *

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[3] "A." refers to the two-volume record appendix filed in the court of appeals.

the Commissioner must show that the taxpayer intended to evade taxes, which he knew or believed he owed, by conduct intended to conceal, mislead, or otherwise prevent the collection of such taxes" (Pet. App. 39a). It thereafter found that "by conduct intended to mislead and conceal his income the petitioner intended to evade tax which he knew or believed he owed" (Pet. App. 52a). As we have pointed out, this conclusion is amply supported by evidence of affirmative acts. Hence, it is plain that petitioner would be liable for the fraud penalty under either the affirmative act or affirmative indication standard. Thus, there is simply no basis for petitioner's assertion (Pet. 13) that this case "squarely presents the conflict" between the "affirmative act" and "affirmative indication" standards.[4]

2. Petitioner admits (Pet. 14 n.12) that he bore the burden of proving the validity of his claimed deductions insofar as the Commissioner's deficiency determination is concerned. He argues (Pet. 13-16), however, that insofar as the fraud penalty is concerned, the burden was on the government to show that petitioner's claimed deductions did not exist because the government is required to prove the existence of the amount of underpayment under 26 U.S.C. 7454(a).

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[4]Petitioner argues (Pet. 10) that the courts below implicitly adopted the affirmative indication standard because they upheld the Commissioner's fraud determination without requiring "any affirmative act of misrepresentation or fraud with respect to the taxing authorities." The record in this case, however, clearly established fraud under the arguably more stringent affirmative act standard. Petitioner's statement that "he always wanted everything paid to him outside the United States, so that he could evade this country's income taxes by concealing the money and not reporting the income" (A. 388), his refusal to give Internal Revenue Service investigators access to his records (A. 271-275, 688-689), his failure to report substantial amounts of income over an extended period of time (A. 238-256, 355-362, 1025-1034), and his deposits of swindled funds in a Swiss bank account (A. 384, 392, 487-488, 516, 524-525, 635-637) provide ample evidence of affirmative acts of fraud.

As the court of appeals here held (Pet. App. 1a-2a), petitioner's description of the burden of proof in the Tax Court is wrong. It is well established that the Commissioner's determination of tax liability is presumptively correct and places on the taxpayer both the burden of going forward with the evidence and the burden of persuading the court that it is erroneous. *Helvering* v. *Taylor*, 293 U.S. 507, 515 (1935); *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933); T.C.R. 142(a) (May 1, 1979). Where, as here, petitioner failed to meet his burden of persuading the court that the Commissioner's determination was erroneous, the existence of the deficiency was then established as a fact.

Section 6653(b) provides that "[i]f any part of any underpayment * * * is due to fraud" the addition to tax shall be applied. The question then was whether any part of the deficiency was attributable to the taxpayer's fraudulent intent. A statutory exception to the general rule places the burden of proof on the issue of fraudulent intent on the Commissioner. See 26 U.S.C. 7454(a); T.C.R. 142(b) (May 1, 1979). The Commissioner is not required to prove the amount of the deficiency twice—once for the deficiency and once again for fraud. Indeed, although courts generally hold that the existence of substantial deficiencies, by itself, is insufficient to support a finding of fraud, where there is additional independent evidence of fraud, the existence of several substantial deficiencies—even where the finding of deficiencies was based on the taxpayer's failure to meet his burden of proof—will support a finding of fraud. See *Jackson* v. *Commissioner*, 380 F.2d 661, 664 (6th Cir. 1967); *Drieborg* v. *Commissioner*, 225 F.2d 216, 218-219 (6th Cir. 1955); *Estate of Beck* v. *Commissioner*, 56 T.C. 297, 363-364 (1971).

Moreover, as petitioner acknowledges (Pet. 14 n.14), even in criminal tax cases where the government has a higher burden of proof, a showing of unreported income

shifts to the taxpayer the burden to explain that omission, and where the taxpayer fails to meet that burden, the courts will find that an underpayment exists. *E.g., United States* v. *Hiett*, 581 F.2d 1199, 1202 (5th Cir. 1978); *United States* v. *Bender*, 218 F.2d 869, 871-872 (7th Cir.), cert. denied, 349 U.S. 920 (1955).[5] This rule is supported by basic rules of allocations of burdens of proof (see *McCormick's Handbook of the Law of Evidence* 787 (E. Cleary 2d ed. 1972)) and applies *a fortiori* in civil tax cases. *Rivera* v. *Commissioner*, 38 T.C.M. (CCH) 1338, 1344 (1979).

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[5]Accordingly, contrary to petitioner's argument (Pet. 14), the decision below does not conflict with *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). That case held only that the existence of a deficiency is an element of criminal tax fraud. *Sansone* did not reach the issue of which party has the burden of proof with respect to offsetting deductions claimed by the taxpayer at trial.

Petitioner's reliance (Pet. 15, 16) on *Considine* v. *United States*, 683 F.2d 1285, 1286 (9th Cir. 1982), and *Goodwin* v. *Commissioner*, 73 T.C. 215, 229-231 (1979), is likewise misplaced. In *Considine*, the taxpayer stipulated that an underpayment existed and that he was only contesting the amount of the underpayment (683 F.2d at 1288). Hence, the court had no occasion to address the question whether the taxpayer in a civil fraud case has the burden of proving his entitlement to business deductions by clear and convincing evidence. Moreover, noting in *Goodwin* v. *Commissioner*, *supra*, is at variance with the rule employed by the court below imposing the burden of proof on petitioner with respect to the deficiency. There, the court held that the taxpayer's conviction for filing false income tax returns estopped him from denying that his returns were false and fraudulent for purposes of the civil fraud penalty. In this respect, the court concluded that the Commissioner "has shown by clear and convincing evidence that an underpayment of tax resulted from these understatements of income, *a part of which was due to fraud*" (73 T.C. at 231) (emphasis supplied). Hence, the court recognized that it was the existence of fraud as to which the Commissioner bore the burden of proof.

Finally, contrary to petitioner's claim (Pet. 15 n.14), the government's *Manual for Criminal Tax Trials* 65 (1973) does not contradict our position here that in a civil fraud case, the taxpayer has the burden of proving the existence of offsetting deductions. Because the income tax is computed on taxable income, the Manual merely instructs the

Here, the goverment's evidence established that petitioner obtained hundreds of thousands of dollars of income by swindling his clients, and that he failed to file tax returns reporting such income. In addition, the evidence established that he took affirmative steps to conceal these payments. The Commissioner in his notices of deficiency allowed petitioner more than $43,000 in deductible business expenses to offset a portion of petitioner's unreported income (Pet. App. 30a). Thus, the burden of going forward to show that the unreported income was further offset by additional deductions shifted to petitioner. The Tax Court found the petitioner's self-serving, uncorroborated testimony to be unworthy of belief (Pet. App. 33a, 38a-39a) and, therefore, found that petitioner had failed to make such a showing. Indeed, the imposition of the burden of proving his entitlement to the deductions is appropriately placed on petitioner since the underlying facts are peculiarly within his knowledge.

Finally, petitioner errs in asserting (Pet. 15) that the decision below conflicts with *Richardson* v. *Commissioner*, 264 F.2d 400, 404 (4th Cir. 1959). In *Richardson*, the taxpayers omitted certain income from their returns, but then proved to the trial court that they had made substantial deductible payments, also omitted from their returns, which were closely intertwined with the unreported income. The court expressly acknowledged that, under the general rule, the taxpayer bears the burden of proving unclaimed deductions, but made a limited exception to the rule under

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government's trial attorneys in a criminal tax evasion case to adduce proof of deductible expenses when the government has evidence of specific items of income omitted from tax returns. Nowhere does the Manual state that the government bears the burden of proving the nonexistence of additional deductions asserted by taxpayer at trial. For the convenience of the Court, we are lodging a copy of the pertinent section of the Manual with the Clerk.

the special facts before it. See 264 F.2d at 405. Unlike the taxpayers in *Richardson*, petitioner failed to establish that any of his records pertaining to his alleged expenses were business-related, for the Tax Court found his uncorroborated testimony to be unconvincing.[6] As a result, there was no reason for the courts below to depart from the general rule that the taxpayer has the burden of proving offsetting deductions asserted at trial.[7]

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[6]The Tax Court heard petitioner's testimony concerning the alleged seizure of his business records and concluded that "we are simply not convinced that the alleged books and records ever existed" (Pet. App. 39a). This is a factual finding that does not warrant further review. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948). Petitioner now claims (Pet. 4) that he has "recently learned" that our government told the Shah of Iran of a plan to "punish" petitioner by asserting tax deficiencies and violations against him. This claim is not based on the record of this case and, therefore, is entitled to no more weight than petitioner's bare assertions regarding the theft of his books and records.

[7]Petitioner contends (Pet. 16-20) that the Tax Court violated his rights to due process under the Fifth Amendment in quashing the subpoenas he served during the trial on various government agencies and departments. The subpoenas were served when the Tax Court trial was already in progress, and they required immediate production of all documents relating to petitioner's tax matters for the years 1957 through 1979. Petitioner sought to place this extraordinary burden upon the government in spite of the fact that he had had years in which to conduct discovery in this case and had studiously refused to do so even at the express admonition of the court. (See A. 95-96, 288, 317-318, 1231-1232.) Thus, there was no reason for the court to permit petitioner to conduct his discovery during the trial when petitioner had consciously refused to seek the documents or to retain counsel at the appropriate time.

Furthermore, while petitioner's counsel argued at trial that the subpoenas should not be quashed (although not on due process grounds) (A. 628), petitioner did not raise the issue either in his post-trial briefs in the Tax Court or in his briefs filed with the court of appeals. Petitioner presented the issue of the quashed subpoenas for the first time in his petition for rehearing, much too late for the issue to be considered a part of this case. Absent exceptional circumstances which are not present

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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here, this Court will not consider issues not raised or passed upon in the lower court. *E.g., Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

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